

# Basel Action Network

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September 8, 2003

Ms. Marianne Lamont Horinko  
Acting Administrator  
Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Dear Ms. Marianne Horinko:

This letter serves as notice pursuant to 15 U.S.C. 2619(b) of our intent to seek judicial relief in 60 days pursuant to 15 U.S.C. 2619(a). It is our position that the Toxic Substances Control Act, 15 U.S.C. 2601 et seq. (TSCA), prohibits the export for disposal of PCBs in concentrations of 50ppm or greater. Any waiver of this prohibition must be formally requested and issued by rule, according to the procedures specified in TSCA, as well as the Administrative Procedures Act, 5 U.S.C. 553. See 15 U.S.C. 2605(e)(1)(A), (3)(B), (4); 40 CFR 761.20, 761.97. EPA may only grant such waiver following such formal rule-making and based upon a finding that an unreasonable risk of injury to health or environment would not result. See 15 USC 2605(e)(3)(B).

The United States Maritime Administration (MARAD) is violating TSCA by planning to imminently export polychlorinated biphenyls (PCBs) without applying for the necessary exemption under TSCA, and EPA is violating TSCA by failing to undertake the non-discretionary rule-making procedure required by TSCA prior to exempting MARAD from the prohibition on PCB exports. See MARAD Letter dated May 7, 2003; EPA Letter dated May 22, 2003 (attached). The rule-making procedure is intended to ensure that EPA adequately consider, based on a reasoned, scientific analysis, with input from the public, whether to grant an exemption to the PCB export ban. Adherence to TSCA's requirements ensures that EPA allows the export of PCBs based upon the most complete information available. For example, the concerns discussed below regarding the adequacy of the AbleUK disposal facility, and many others, would certainly have been addressed during the required rule-making procedure.

We have learned that AbleUK at Teesside, England does not currently possess a facility that is in any meaningful sense ready to adequately dismantle the MARAD vessels, as presently there is no dry-docking facility or equivalent in place. A basin exists, but there are no gates or other means of sealing the basin for drainage. Further, the planned docking facility, which includes the planned creation of a cofferdam or bund to create a 'dry' basin for managing the vessels, does not at present have the necessary planning or construction permission from the local authorities. Only on 20 August was an application for such permission submitted to Hartlepool Borough Council, the local authority.

Approval of the application is far from assured. Indeed, there is likely to be considerable opposition to it for a number of reasons, not the least of which is that the proposed dam construction is scheduled to take place in or adjacent to two areas of particular ecological importance, protected under UK and European Law. Part of the proposed dam construction is scheduled to take place within Seal Sands (a Site of Special Scientific Interest protected under the UK Wildlife and Countryside Act 1981). The site is also in the immediate proximity of Teesmouth and Cleveland Coast Special Protection Area (Ramsar Site), a site protected both under European Law (Wild Birds Directive 1974) and domestic UK law (Conservation [Natural Habitats &c] Regulations 1994 (SI1994/2716)). It is therefore highly likely that a full environmental impact assessment procedure will be required by the local authority before any permission may be granted for the construction of the cofferdam. The timetable for the granting of any such permission, if at all, is therefore extremely uncertain.

We believe, therefore, that the statement made by EPA in its "enforcement discretion" letter of May 22, 2003, that the facility "can be sealed and drained similar to a dry-dock" is speculative. At present, the facility has no gate and no method of sealing. Given these facts, and given the contractual deadline of moving the ships prior to November 30, it is perfectly possible that the ships will be towed at risk to the marine environment and public health all the way to the UK from the James River before any approval and permission is in place (and with doubt as to whether such a permission will be granted). Such movement has a considerable chance of representing a breach of the "enforcement discretion" which states that the "purchaser understands that he may not resell the vessel except to carry out the purposes of this agreement (that is, for scrapping at AbleUK, Teesside, England)." Without the ability to process the vessels at AbleUK and without ability to sell the vessels elsewhere, the contractors will be in breach.

In such a circumstance, in accordance with the OECD Council Decision C(2001)107/FINAL, the ships may have to be returned with the US taking responsibility. Such a scenario, whereby the ships are rendered homeless and the US taxpayers may be forced to pay for the double towing of vessels that never needed to be towed in the first place, is unacceptable and could well represent or EPA an environmental and political nightmare.

Further, we understand from the attached excerpted letter from the UK Health & Safety Executive that the UK authorities have been misinformed about disposal capacity in the United States. The letter states:

*"In discussions with the US Bureau of Oceans and International Environmental and Scientific Affairs we were told that if the ships were not recycled in the UK they would then consider exporting to other countries, where the recycling would be likely to be carried out with less regard for both environment and the health and safety of workers. There were also assertions by them that there was insufficient capacity available in the US."*



We would submit that this assertion, if it indeed was made by the State Department, is patently a false one. 30 of the PRDA proposals submitted to MARAD for dismantling the MARAD fleet of obsolete ships were from domestic recyclers, several of which have already successfully scrapped MARAD and US Naval vessels containing asbestos and PCBs. An additional 4 proposals sought to use the ships domestically as artificial reefs. The non-competitive nature of the bidding process conducted by MARAD effectively prevented domestic recyclers from making alternative bids on the same 15 ships under the same conditions granted to PRP. This startling fact has already raised strong concern from Congressman Weldon and Congressman Ortiz, as their constituent shipbreaking businesses were not asked to counterbid or otherwise fairly compete on the same ships and similar conditions in the deal that was finally struck. We have it on excellent authority that MARAD knew that had domestic recyclers been able to compete, they would have been able to dismantle the ships safely for far less taxpayer dollars being spent.

Furthermore, the idea that the US would export ships to developing countries in contravention of the Basel obligations of those importing countries, if this deal did not go through, is far from certain, however strong the intent of MARAD might be to do so. Due to the fact that China, India, Pakistan and Bangladesh, the world's leading shipbreaking countries, are all Parties to the Basel Convention, while the USA is not, would mean that importation of such vessels would be forbidden from a non-Party (USA), absent a special bilateral agreement. Additionally, such a decision would be highly publicized and roundly condemned, leading to likely political action to halt such plans, as was the case when the Baltimore Sun released its Pulitzer Prize winning series on ship scrapping, which hastily led to a US export moratorium (only recently overturned).

Despite these facts, the UK Health and Safety Executive apparently was led to believe that export to Asia was imminent and domestic capacity insufficient. It is highly likely that this weighed heavily on decisions to allow the importation. With such false information, the UK could justify the import under the Basel Convention's Article 4 paragraph 9, which cites the only current conditions under which transboundary movements of hazardous waste should take place: a) The State of export lacks the technical capacity to deal with the waste; or b) the wastes in question are required as a raw material in the country of import.

Needless to say, neither of these objectives are fulfilled by this waste shipment. While it is known that OECD Council Decision C(2001)107/FINAL is considered to be a valid Basel Convention Article 11 agreement, under which such recycling can take place between member states of the OECD, the OECD agreement does not demand or foresee the waiver of domestic laws (e.g. those which ban importation of asbestos). Further, under the OECD regime, such export and management can only take place in accordance with assurance of environmentally sound management and such management cannot be assured when the facility to manage the wastes lacks the necessary permits and facilities to do so.

For the above reasons, we believe that EPA should revoke the May 22 "enforcement discretion" until:

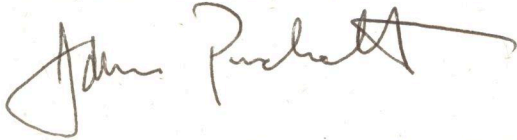
- (i) MARAD requests a waiver by rule pursuant to the requirements of TSCA; and
- (ii) EPA grants such waiver by rule based upon a finding that no unreasonable risk of injury to health or environment would result from such waiver. In undertaking such rule-making, EPA should ensure, *inter alia*, that all authorities for fulfilling the

contracts and conditions are in place and the Authorities in the UK are made aware that the United States possesses full capability of handling these vessels domestically.

We look forward to your timely response to our concerns.

Sincerely yours,

Jim Puckett, Coordinator, Basel Action Network

A handwritten signature in dark ink, appearing to read "Jim Puckett", with a stylized, sweeping flourish at the end.

Mr. Aaron Isherwood, Staff Attorney, Sierra Club

A handwritten signature in dark ink, appearing to read "Aaron Isherwood", with a stylized, sweeping flourish at the end.

cc.

Captain William G. Schubert, MARAD Administrator  
Mr. Elliott Gilberg, Assoc. Director, Federal Facilities Enforcement Office, EPA  
US Congressman Curt Weldon, Pennsylvania  
US Congressman Solomon Ortiz, Texas  
Michael Carter, US Maritime Administration  
James E. Caponiti, Associate Administrator for National Security  
John Peter Suarez, Assistant Administrator, EPA  
Vice President Dick Cheney